



**INTERNATIONAL COMPETITION NETWORK**

**2008-2009 Member Materials from  
Conference Call Series**

*Prepared by*

**Cartel Working Group  
Legal Framework Subgroup**

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**Cartel Working Group  
Legal Framework Subgroup  
2008-2009 Executive Summary**

***Mission***

ICN's Cartel Working Group brings together antitrust enforcers who share a willingness to work together against hardcore cartels, enhancing the ability to shut down both domestic and international cartels. The Working Group aims to reduce obstacles that antitrust agencies face in cracking cartels through the examination of important legal and policy topics and the exchange of effective investigative techniques.

The Legal Framework subgroup addresses the legal and conceptual challenges of anti-cartel enforcement. The focus of the subgroup is examining policy-level issues of the institutional and investigative framework for the detection and punishment of hard-core cartel conduct.

***Achievements***

The Legal Framework subgroup has developed reports on important legal and policy topics in anti-cartel enforcement with the aim of providing practical ideas for members to use in improving their anti-cartel strategy and enforcement. Topics include:

- Negotiated settlements. The subgroup's work addresses the underlying principles and benefits of cartel settlements and practical aspects of achieving them.
- Corporate fines. Work addresses practical issues that jurisdictions face in setting fines for cartel conduct.
- Inter-agency cooperation. The report on cooperation in cartel investigations identifies the types of cooperation possible.
- Effective institutional frameworks for anti-cartel enforcement.
- Obstruction. The report addresses the importance of identifying and pursuing obstruction in cartel investigations and presents practical ideas for members to do so.
- Private enforcement of cartel rules. The report gives an overview of the legal systems that provide for private enforcement explores the interaction between public and private enforcement in cartel cases.

***Recent Work***

The Legal Framework Subgroup has held a series of substantive, experience sharing anti-cartel enforcer calls addressing effective inter-agency coordination, both at the multijurisdictional and domestic levels. The series has attracted unprecedented member participation.

The teleconference series devoted significant discussion to issues that arise in the transition from an administrative system to criminal sanctions for cartel conduct. These discussions included the benefits of criminal sanctions beyond deterrence, such as the availability of enhanced

investigative tools; key issues to consider during the legislative process; building relationships with public prosecutors for enforcement cooperation; interaction with other stakeholders; and ensuring that the possibility of criminal sanctions acts as additional incentive to apply for leniency.

In one discussion, the United States Department of Justice and the United Kingdom's Office of Fair Trading used public information about recent convictions in the marine hose industry to discuss broader issues of international cooperation and the use of criminal sanctions. The discussion covered issues and considerations involved in effective international coordination and parallel enforcement across jurisdictions. The UK's first criminal proceedings for a cartel offense demonstrate the risks to individuals of cartel conduct when jurisdictions have and use criminal sanctions.

Brazil's Secretariat of Economic Law of the Ministry of Justice (SDE) and the Australian Competition and Consumer Commission (ACCC) each led calls focused on their interactions with their prosecutors and investigators to bolster cartel enforcement. SDE's efforts aimed at employing creative education, training and awareness initiatives aimed at building support throughout Brazil for its criminal cartel enforcement initiatives have yielded impressive results. The ACCC, in its transition to expected criminal sanctions, has laid a solid foundation for successful cooperation with its prosecutors, having already concluded an MOU and conducted joint training with Australia's federal prosecutor, the Commonwealth Director of Public Prosecutions (DPP).

### *Brazil's Experience*

The prosecution of hard-core cartels has been a top priority in Brazil since 2003, when SDE started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (such as dawn raids and leniency), and the CADE began imposing record fines on companies and executives found liable for cartel conduct. Also, the SDE significantly improved the interaction and cooperation with criminal prosecutors to strengthen anti-cartel enforcement in Brazil.

SDE discussed its initiatives to achieve effective cooperation with the criminal prosecutors. Among the highlights:

- SDE worked to convince prosecutors of the importance of fighting cartels and that leniency is as valuable a tool for their prosecution efforts as it is for the administrative agencies. Prosecutors are viewed by SDE as partners in the leniency process and they are invited to sign the leniency letters.
- SDE's interaction and cooperation with public prosecutors gives SDE the ability to tap into the different investigation tools and resources available through the police and prosecutors (for instance, the use of wiretaps). An extensive network of police and prosecutors more attuned to cartel conduct helps with cartel detection.
- SDE has made anti-cartel enforcement its number one priority and views criminal prosecution of such conduct as critical to ensuring effective deterrence. To bolster enforcement, a real commitment was made to develop relationships with prosecutors founded on mutual respect and expertise sharing. Today, the benefits of this cooperative relationship are evident in the increased level of anti-cartel enforcement in Brazil.

More information on these and SDE's other anti-cartel initiatives can be found at SDE's website at (English section):

<http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>

### *Australia's Experience*

The ACCC described Australia's recent progress towards criminalization of hardcore cartel conduct. In Australia, the ACCC and the DPP will each have roles in anti-cartel enforcement. After careful review, Australia determined that the possibility of criminal sanctions for company executives will increase the deterrent effect for businesses, enhance incentives to apply for leniency and bolster the detection of cartel conduct and making additional investigative tools available.

In contemplating the framework for criminal sanctions during the legislative drafting process, the Australian government considered and addressed the standard and penalties for criminal conduct and key questions of who will investigate, who will prosecute, who will hear the cases. The transition to criminalization will also bring new investigative tools for the gathering of evidence (such as telephone interception) while extending existing powers to the criminal setting.

The ACCC has begun to build a framework for criminal prosecution. Given the dual enforcement model with DPP, they made a concerted effort to advance policy and legislative issues together with the DPP. Recognizing the importance of the leniency program and not wanting its benefits to be undermined, the ACCC convinced the DPP of the importance of upfront and certain immunity processes for cartel conduct. The DPP's agreement to grant immunity to a cartel member if they met the conditions for immunity contained in the ACCC's immunity policy broke new ground. Ordinarily the DPP approaches the grant of immunity as a last resort and to be provided at latter stages, not upfront. The coordination between the ACCC and DPP will help ensure that the incentives to apply for leniency are maintained.

The ACCC and DPP have established a Memorandum of Understanding between the agencies. The MOU outlines the roles each agency will play from investigation of the cartel conduct by the ACCC through to prosecution, as well as the principles that will guide dealings between the agencies in criminal cartel matters.

For more information:

<http://www.accc.gov.au/content/index.phtml/itemId/851274>

<http://www.accc.gov.au/content/index.phtml/itemId/706268>

[http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=353cdd807d07c920e807e65c172e1086&fn=ACCC\\_CDPP\\_MOU.pdf](http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=353cdd807d07c920e807e65c172e1086&fn=ACCC_CDPP_MOU.pdf)

<http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/087.htm&pageID=003&min=ceb&Year=&DocType=>

# International cartels and UK criminal enforcement

## The Marine Hose experience

Stephen Blake  
Director - Cartels  
Office of Fair Trading

16 October 2008

## Outline

- ▶ **Outline of case**
- ▶ **Chronology of investigation**
- ▶ **International cooperation**
- ▶ **US plea agreement**
- ▶ **UK criminal proceedings**
- ▶ **Impact of case**

## Outline of case

- ▶ **Global cartel - market sharing and price-fixing**
  - ▶ Major suppliers of marine hose
    - ▶ Japan
    - ▶ Europe (UK, Italy and France)
  - ▶ Coordinated from the UK
- ▶ **Coordinated enforcement**
  - ▶ European Commission
  - ▶ US Department of Justice
  - ▶ OFT (criminal)
  - ▶ Japanese Fair Trade Commission and others
- ▶ **Small niche market**
  - ▶ Significant deterrence

## Chronology of investigation

- ▶ **Jan. 2007 – start of OFT investigation**
  - ▶ Early contacts between agencies
- ▶ **May 2007 - coordinated inspections**
  - ▶ EC, OFT and DoJ
  - ▶ Timed to coincide DoJ operation in US
    - ▶ Covert recording of cartel meeting
    - ▶ Arrest of participants
- ▶ **Jul. and Sep. 2007 – OFT interviews in US**
- ▶ **Dec. 2007 – Filing of US plea agreements**
  - ▶ Providing for return of UK suspects to face charges in UK
- ▶ **Dec. 2007 – Return of UK suspects to UK**
  - ▶ Arrest, final interview and charge

## International cooperation (1)

- ▶ **Coordination of inspections**
  - ▶ Managing different time zones
  - ▶ Entering domestic premises – OFT/ EC liaison with DoJ
- ▶ **Specific issues for OFT and EC**
  - ▶ Dual role of OFT
  - ▶ Need for clarity of powers used
    - ▶ Separate OFT teams/ 'Chinese walls'
    - ▶ Separate warrant applications
    - ▶ Detailed provisions regulating conduct of inspections

## International cooperation (2)

- ▶ **Interview of UK suspects in the US**
  - ▶ Consent of suspects and of DoJ
- ▶ **Sharing of evidence**
  - ▶ Evidence collected by the OFT in the UK
  - ▶ Surveillance evidence collected in the US
- ▶ **US plea agreement for UK suspects**
  - ▶ Provision for UK suspects to plead guilty in the US but return to the UK and face prosecution here
  - ▶ Provisions relating to service of sentence in the UK
  - ▶ Double jeopardy

## US Plea Agreement (1)

- ▶ **Key provisions**
  - ▶ Defendants pleaded guilty to violations of US law but were allowed to return to UK for prosecution in UK
  - ▶ Sentences for violations of US law
    - ▶ Prison sentences (between 20 and 30 months)
    - ▶ Fines (between US\$75,000 and US\$100,000)
  - ▶ US prison sentences reduced by length of any UK sentence

## US Plea Agreement (2)

- ▶ **Double jeopardy**
  - ▶ No overlap of geographical scope
    - ▶ US charges limited to US commerce
    - ▶ UK charges limited to UK supplies
  - ▶ Plea agreement structured to avoid double punishment
  - ▶ Reaction of English court
    - ▶ No adverse comment to make
    - ▶ Agreements entered into in good faith and on advice

## UK criminal proceedings

- ▶ **First UK criminal proceedings for cartel offence**
- ▶ **Three guilty pleas and significant sentences**
  - ▶ Between 30 and 36 years (appeals pending)
    - ▶ Indication that likely future sentence for a serious offence of this nature may be higher
  - ▶ Director disqualification of between 5 and 7 years
- ▶ **Confiscation and costs orders**
  - ▶ Total of over £1 million confiscated from two defendants
  - ▶ £25,000 in costs imposed on one defendant

## Impact of case

- ▶ **Small market**
  - ▶ Estimated global turnover USD 120-150 million
- ▶ **Significant deterrence**
  - ▶ First UK prosecution for cartel offence
  - ▶ Concrete demonstration of risks to individuals of cartel conduct
    - ▶ Prosecution with prospect of jail sentence and/ or fine
    - ▶ Confiscation of proceeds of crime
    - ▶ Director disqualification
  - ▶ Demonstration of capacity for effective combined international enforcement
- ▶ **Benefits for leniency policies**
  - ▶ Effective operation of leniency in EC, UK criminal, US and Japanese context

## UK press coverage

### Running a cartel? Be afraid - very afraid<sup>1</sup>

The jailing of three businessmen shows just how serious the authorities - both the UK and US - are about competition compliance.

Frances Gibb, Legal Editor

Read more of Frances Gibb's exclusive online columns

The jailing of three former Dunlop Oil and Marine Limited executives last week that conned millions of pounds out of the Ministry of Defence and others for

OFT gets on to cartels at last<sup>2</sup>

Best practice guidelines and ethics seminars are all very well, but nothing like what the OFT has done.

### Oil industry executives jailed for price-fixing

Judge issues tough warning on cartels<sup>3</sup>

First criminal case of its kind in Britain

By Megan Murphy, Law Courts Correspondent

...ation will not be open to them and any likely sentence will be higher than

### Three jailed for running price-fixing hose cartel<sup>4</sup>

Michael Herman

Three oil executives were jailed for price-fixing yesterday in Britain's first prosecution for cartel offences.

...trated and comprehensive process\* of fixing prices, which has been a criminal offence in the UK since 2003. The Office of Fair Trading, which brought the prosecution, said that it

<sup>1</sup>Times Online, 16 June 2008

<sup>2</sup>The Times, 12 June 2008

<sup>3</sup>Financial Times, 12 June 2008

<sup>4</sup>The Times, 12 June 2008

## UK press coverage (2)

### UK first for price-fixing charges<sup>1</sup>

Executives face criminal prosecution

Landmark deal for proceedings in the US

By Michael Park, Legal Correspondent

Three oil industry executives face the UK's first ever criminal prosecution for price-fixing under a landmark deal with the US that would have a significant impact

...guilty to conspiring with the US Department of Justice. Mr Al-Dabbas was sent home, then

<sup>1</sup>Financial Times, 12 December 2007

### Repatriation to create legal landmark<sup>2</sup>

NEWS ANALYSIS  
Courtroom deal may see executives sent home, then

...and British desire to crack down on cartels. Because his clients have co-operated with the authorities, he says, they will "not be serving on them at all as a United States

The first of the case's two main novelties is that it would be to effect head-to-head negotiations with the OFT. The OFT's "independent" cartel prosecution on a state-

The potentially wider impact of the marine hoses case is that the US authorities' approach could be extended to other forms of financial crime which affect

...issues in jail nearer their families and friends, provided they plead guilty. That option was not available to the three British financial crime suspects at

Corporate crime

Blazing trails

Dec 13th 2007  
From The Economist print edition

An intriguing plea deal in America has big implications for Britain

IF BRITISH businessmen were warned that they will be seized next by the ever-

<sup>2</sup>Financial Times, 12 December 2007

### The marine hose cartel: a new era in international co-operation<sup>3</sup>

The OFT brings its first criminal charges against an international bid rigging, price-fixing and market allocation cartel

<sup>3</sup>Competition Law Insight, 12 February 2008

## **Overall assessment**

**Positive experience of effective  
cooperation and coordinated  
enforcement across jurisdictions**

## **‘Transitioning to a criminal cartel regime’**

*Issues that competition enforcers face when transitioning from a civil to a criminal cartel regime*

THURSDAY 22 JANUARY 2009 – 11PM TELECONFERENCE

ISSUES FOR DISCUSSION:

### *Background*

- The move to criminalise cartel conduct in Australia
- What we have in Australia at present
- What we will have in the future (if the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 passes)

### **What might be the common issues in a move to criminalisation?**

- 1) Preliminary stage – getting the concept approved
- 2) Secondary stage – choice of the framework
- 3) Intermediate stage – building the framework
- 4) Advanced stage – getting the ‘house’ approved

#### **Preliminary stage – getting the concept approved**

Why change? Is criminalisation a good thing? Politics and business – the degree of support for criminalisation

- Why change? Aren’t penalties enough – building support for the offence.
- Inquiries – Dawson Inquiry in Australia – What might be the tipping point in your jurisdiction?
- Australia already applies sanctions for individuals for cartel conduct, some countries only provide for corporate sanctions
- Detection, deterrence, proportionality

#### **Secondary stage – how is it going to happen? Choice of framework**

If criminalisation of cartels is ok in theory, what about in practice?

#### Choice of cartel offence

- Perhaps the thorniest issue – What sort of offence is appropriate? Which leads to what cases do you prosecute criminally?
  - Criminality based on moral failure – dishonesty
  - Criminality based on the level of damage caused
  - Criminality based upon proving a person’s intention to enter a cartel beyond reasonable doubt.

- A mixture?

*Every model is likely to have its supporters and critics – there may be no one model which will be universally supported?*

- Support for criminalisation in practice may depend upon the shape of the offence
- If you're going to have a civil and criminal regime, do you build in a differentiating element in legislation or in a policy statement?

*Which leads to the next issue....*

### Who will prosecute the offence?

- Who is going to prosecute? Investigations and prosecutions under the one roof?
- Bifurcation? Investigative agency and an independent prosecutor

*Pluses and minuses for both.*

- If all under the one roof do you have people experienced in prosecuting offences where people go to gaol?
- Culture
- Independent prosecutor: A valuable sounding board / objective outsider / or a hindrance?
- Immunity required from one or two organisations?

### Who will investigate the cartel offence?

- Antitrust regulator?
- Police? – Getting the police interested in cartel investigations
- Combination of both?

### The Courts

- So who's going to hear this cartel trial? A court with experience in criminal law? A court with experience in competition law matters? Both?
- Should the trial be held before a judge and jury? Judge alone? Constitutional issues in Australia.

## **Intermediate stage – building the framework**

### Drafting Instructions, Draft Bills etc

- Working with the policy agency / or drafters (Is your organisation responsible for drafting legislation?)
- Apart from the regulator, who else assists?
  - Role of the judiciary in preparations for criminalisation – Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008. Judges – in Australia – formerly our best barristers – providing input to ensure a workable regime:
    - Procedural law in relation to hearing the matter
    - Bail etc
    - Jury
- Good public policy

### Relationship building with the prosecutor

- Development of liaison / contact points
- A willingness to make things work
- Sounding board for development of the offence / practicalities
- Training
- Joint statement of expectations as to how the investigation, referral and prosecution process will operate with criminal cartels
- MOUs – best practice for working together?

### Are there changes that will be forced by criminalisation? *The need for internal review...*

#### *Do you need to update your Immunity Policy?*

- What changes are likely to be required if any?
- Level of change may reflect whether your country has gone for a ‘all under one roof’ or a bifurcated model.
- The changes made by the ACCC and CDPP and how it occurred.

#### *Will existing **powers** do the job? Or apply to the new regime?*

- The key is proving a matter beyond reasonable doubt. Role of:
  - Notice based powers
  - Search warrants
- New powers / capacities (and their role)?
  - Telephone intercepts
  - Surveillance
  - Proceeds of crime
  - MLATS
  - Extradition

#### *Will existing **procedures** do the job? How do you investigate now – how will you need to investigate in the future??*

- Do you investigate all matters to meet criminal standards of evidence?
- Parallel civil and criminal investigations?
- Evidence handling – notebooks, chain of evidence, evidence officers, evidence rooms
- Interview of witnesses
- Internal decision making processes
- Who will investigate – a criminal branch / team?

If NO, how are you going to address this? ACCC approach has been to get things running ahead of criminalisation / Option B is to bring into effect when the law changes, apply to the first case that comes up...

And if YES, do you want to take the opportunity to introduce some new changes that you’ve been meaning to get around to?

### Role of Training

- Search warrants, cross examination, interviewing

- Opportunity to create and build relationships with government agencies

***Advanced stage – getting the ‘house’ approved***

- The draft legislation is released to the public
- The Bill is introduced into Parliament
- Opposition to any change? Existing arrangements which push the threshold of legality
- Support? Pay day for law firms? Spike in inquiries – to square off existing deals and ongoing requests for advice given the serious consequences.
- Awareness raising by the regulator – publications, speeches etc

**At the end of all this, if you had to investigate and build a criminal cartel matter tomorrow could you do it?**

**So when are you going to have that criminal cartel matter in court?**

- Dealing with internal and external expectations



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# NEWS RELEASE

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## *ACCC and CDPP outline arrangements for cartel conduct immunity*

In response to the Government's proposal to amend the *Trade Practices Act 1974* and criminalise cartel conduct in Australia, the Australian Competition and Consumer Commission and Commonwealth Director of Public Prosecutions have today issued the final Memorandum of Understanding between the agencies.

The MOU outlines the roles each agency will play from investigation of the cartel conduct by the ACCC through to prosecution, as well as the principles that will guide dealings between the agencies in criminal cartel matters. It is proposed that the MOU will be signed after amendments to the Act receive Royal Assent and before the commencement of the new offences.

The ACCC has issued its revised Immunity Policy and Guidelines that will apply to applications for immunity from cartel conduct under the proposed civil provisions.

"Changes to the immunity policy and guidelines have been made in a way that incorporates amendments necessary in the proposed criminal cartel environment whilst continuing to maintain certainty for potential immunity applicants, one of the cornerstones of the ACCC's immunity program," ACCC Chairman, Mr Graeme Samuel, said today.

"The introduction of jail terms for individuals involved in cartel conduct means that not only should companies fear their competitors reporting their involvement to the ACCC, but their own employees and former employees as they can avoid jail by reporting their involvement in cartel conduct to the ACCC under the immunity policy."

The CDPP has issued its Annexure to the *Prosecution Policy of the Commonwealth*, which outlines the policy of the CDPP in considering an application for immunity from prosecution by a person implicated in a serious cartel offence. The CDPP will apply the same criteria as the ACCC when considering a recommendation by the ACCC that an applicant be granted immunity.

As foreshadowed as early as 2005, the Annexure will ensure consistency in the handling and operation of each agency's policies that deal with immunity from cartel conduct and continued provision of upfront immunity.

For **media inquiries** to the ACCC Chairman, Mr Graeme Samuel, please call Ms Lin Enright, ACCC Media, on (02) 6243 1108 or 0414 613 520.

For **general ACCC inquiries**, please call the Infocentre: 1300 302 502.

For **CDPP inquiries** please call Ms Kathy Medved on (02) 6206 5606.

Release # NR 338/08

Issued: 1<sup>st</sup> December 2008

#### **Links**

- [Immunity from prosecution](http://www.accc.gov.au/content/index.phtml/itemId/706268) - <http://www.accc.gov.au/content/index.phtml/itemId/706268>

## **Immunity from prosecution**

The immunity policy seeks to maximise the incentives for cartel participants to self-report their involvement in a cartel and to provide certainty for applicants about how the ACCC will deal with immunity applications. Like the 2003 leniency policy, the immunity policy only applies to cartel conduct.

The immunity policy will confer full amnesty from prosecution and penalty to the first eligible cartel participant to report its involvement in a cartel and cooperate with the ACCC's investigation and prosecution of other cartel participants.

For the purposes of the immunity policy, cartel conduct comprises any of the following categories of conduct engaged in by two or more businesses who are, or otherwise would be, in competition with each other:

- price fixing
- market sharing including bid rigging, customer sharing and market allocation
- agreements not to compete with each other or to limit or restrict competition between them
- production or sales quotas.

The immunity policy applies to large and small businesses (whether or not they are incorporated) and to individuals who have engaged in cartel conduct affecting Australian markets. The policy will not apply to cartel ringleaders or cartel members who have coerced others into participating in the cartel. The full list of conditions is outlined in the immunity policy.

The immunity policy applies to applications received after 9am EST on 5 September 2005 and replaces the ACCC's leniency policy. (The ACCC's now-replaced leniency policy came into force on 30 June 2003.) The immunity policy is to be read in conjunction with the immunity policy interpretation guidelines.

If an applicant is ineligible for immunity but wishes to cooperate with the ACCC, their cooperation may consider under the ACCC's [cooperation policy](#).

See the publication: [ACCC immunity policy for cartel conduct](#).

**\*\*UPDATE: 1 December 2008\*\***

In response to the Government's proposal to amend the Trade Practices Act 1974 and criminalise cartel conduct in Australia, the ACCC and Commonwealth Director of Public Prosecutions have issued the final Memorandum of Understanding between the agencies. It is proposed that the MOU will be signed after amendments to the Act receives Royal Assent and before the commencement of any new cartel provisions.

The ACCC has issued its revised Immunity Policy and Guidelines that will apply to applications for immunity from cartel conduct under the proposed civil and criminal provisions.

The CDPP has issued its Annexure to the Prosecution Policy of the Commonwealth, which outlines the policy of the CDPP in considering an application for immunity from prosecution by a person implicated in a serious cartel offence.

It is intended that these documents will become operational on commencement of the new civil and criminal cartel provisions.

#### *Attachments*

 [ACCC CDPP MOU.pdf](#) (34.6 KB)

 [Revised Immunity Policy.pdf](#) (102.9 KB)

 [Revised Interpretation Guidelines.pdf](#) (188.1 KB)

 [Annexure.pdf](#) (36.1 KB)

**Memorandum of Understanding**  
**between**  
**the Commonwealth Director of Public Prosecutions**  
**and**  
**the Australian Competition and Consumer Commission regarding**  
**Serious Cartel Conduct**

**1: Introduction**

1.1 Price fixing, market sharing, output control and bid rigging ('cartel conduct') adversely affect Australia's domestic and international competitiveness. Such conduct harms consumers, businesses and the economy by increasing prices and reducing choice, service, innovation and efficiencies.

1.2 The Australian Government has introduced criminal sanctions for serious cartel conduct, which operate in parallel with civil sanctions for cartel conduct. This enables a proportionate response to cartel conduct. Criminal investigations and prosecutions will be targeted at serious cartel conduct, and relatively minor conduct will ordinarily be pursued civilly.

**2: Responsibilities**

2.1 The DPP and the ACCC recognise each other's respective roles in the criminal investigation and prosecution process, and that close cooperation and consultation is required to achieve efficient and effective outcomes.

2.2 The DPP is responsible for:

- prosecuting offences against Commonwealth law, including serious cartel offences under the *Trade Practices Act 1974* and State and Territory Competition Codes, in accordance with the *Prosecution Policy of the Commonwealth*; and
- seeking associated remedies, including by taking proceedings under the *Proceeds of Crime Act 1987* and *Proceeds of Crime Act 2002*.

2.3 The ACCC is responsible for:

- investigating cartel conduct and gathering evidence;
- managing the immunity process, in consultation with the DPP; and
- referral of serious cartel conduct to the DPP for consideration for prosecution.

### **3: Decision to investigate**

3.1 The ACCC gives high priority to deterring, detecting and dismantling cartels that affect Australia.

3.2 Not all ACCC investigations concerning cartel conduct will result in enforcement action or be referred to the DPP.

3.3 In conducting investigations of alleged cartel conduct the ACCC will have regard to whether the conduct is such that it would warrant referral to the DPP if evidence sufficient to found a prosecution were obtained.

3.4 The ACCC will review cartel investigations to ensure they are proceeding effectively and efficiently, including whether referral to the DPP for consideration for prosecution is warranted.

### **4: ACCC referral to the DPP**

4.1 Where the ACCC is considering referral of a matter to the DPP, the ACCC will consult the DPP and the DPP will provide preliminary advice as to whether the matter should continue to be pursued with a view to possible criminal proceedings, and in relation to evidentiary considerations as requested.

4.2 Factors in the ACCC considering whether to refer serious cartel conduct to the DPP for consideration for prosecution are related to the ACCC's assessment of how such conduct can be best addressed to achieve general and specific compliance, and to factors to which the DPP has regard in considering whether to prosecute.

4.3 The ACCC will not ordinarily refer relatively minor cartel conduct to the DPP for consideration for prosecution.

4.4 Referral of possible serious cartel conduct will concentrate upon conduct of the type that can cause large scale or serious economic harm, and the ACCC will have regard to considerations including such as whether:

- the conduct was longstanding or had, or could have, a significant impact on the market in which the conduct occurred

- the conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participant
- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct either criminal or civil
- the value of the affected commerce exceeded or would exceed \$1 million within a 12 month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed \$1 million within a 12 month period)
- in the case of bid rigging, the value of the bid or series of bids exceeded \$1 million within a 12 month period.

4.5 The ACCC will formally refer matters to the DPP as soon as reasonably possible for determination as to whether prosecution is warranted.

4.6 The referral will comply with the *Guidelines for departments and agencies on submitting briefs to the DPP* or as otherwise agreed with the DPP. Where the DPP requests the ACCC to undertake further investigations, the ACCC will as far as reasonably possible undertake them.

4.7 The ACCC will keep cartel investigations under review to ensure they are proceeding effectively and efficiently, including whether referral to the DPP for consideration for prosecution is warranted.

## **5: DPP decision to prosecute**

5.1 Upon formal referral of a matter to the DPP by the ACCC the DPP will, as soon as reasonably possible, advise the ACCC whether in accordance with the *Prosecution Policy of the Commonwealth* a prosecution should be commenced.

5.2 In considering whether a prosecution should be commenced the DPP will have regard to:

- The impact of the cartel on the market;
- The scale of the detriment caused to consumers or the public; and
- Whether any of the cartel members have previously been found by a criminal or civil court, or admitted, to have engaged in cartel behaviour.

## **6: Related criminal and civil proceedings**

6.1 The DPP and ACCC acknowledge that some matters may warrant both criminal and civil proceedings.

6.2 The DPP and ACCC will ensure that such matters are managed in an integrated fashion, including through the adoption of measures to avoid any potential for civil proceedings conducted by the ACCC to adversely affect a related criminal investigation or prosecution.

## **7: Immunity from proceedings for cartel conduct**

7.1 The DPP and the ACCC recognise that maximisation of certainty and minimisation of discretion as far as reasonably possible are crucial to the effective operation of immunity policies for cartel conduct.

7.2 The ACCC will publish from time to time its immunity policy in relation to cartel conduct so that the availability and conditions of civil immunity from proceedings by the ACCC for cartel conduct may be clearly ascertained.

7.3 The ACCC will receive and manage requests for immunity from both criminal and civil proceedings, and make recommendations to the DPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's immunity policy in relation to cartel conduct. The ACCC will decide whether to grant immunity from civil proceedings in accordance with its published policy.

7.4 The DPP will decide whether to grant immunity from criminal proceedings in accordance with the *Prosecution Policy of the Commonwealth* (including the Annexure to the policy) and upon the recommendation of the ACCC.

7.5 The ACCC will consult with the DPP in relation to the ACCC's decision as to whether or not to grant immunity and the management of requests for immunity from ACCC civil proceedings where the matter also concerns criminal investigation or prosecution.

7.6 Where application is made for immunity from civil and criminal proceedings, and the matter is not referred to the DPP for criminal prosecution, the ACCC will make a recommendation to the DPP based on the ACCC's assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's immunity policy in relation to cartel conduct.

7.7 Where the ACCC makes a recommendation that the applicant meets the ACCC's criteria for civil immunity the DPP will decide whether to grant immunity from criminal proceedings in accordance with the *Prosecution Policy of the Commonwealth* (including the Annexure to the policy).

## **8: Liaison**

8.1 The Commonwealth Director of Public Prosecutions and the Chairman of the ACCC will meet at least once per annum to review the general working relationship between the DPP and the ACCC.

8.2 The ACCC and DPP have nominated organisational relationship managers for regular and ad hoc national liaison to facilitate, amongst other things:

- the ACCC advising the DPP in relation to immunity applications and matters that are likely to be referred;
- the review of current matters that have been referred to the DPP;
- the ACCC and DPP ensuring that case officers have been nominated for every matter that is referred;
- the review of the effectiveness of operational arrangements.

8.3 The national relationship managers are:

DPP: Deputy Director (Commercial)

ACCC: Executive General Manager (Enforcement and Compliance Division)

8.4 If there is a dispute as to whether a particular matter should or should not be the subject of criminal investigation or prosecution and it cannot be resolved between the relationship managers, the dispute will be referred to the Commonwealth Director of Public Prosecutions and the Chairman of the ACCC to be resolved by them.

DATED this                      day of                      2008

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**Graeme Samuel**  
 Chairman  
 Australian Competition and  
 Consumer Commission

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**Chris Craigie SC**  
 Commonwealth Director of  
 Public Prosecutions



## BRAZIL'S ANTI-CARTEL PROGRAM

The prosecution of hard-core cartels is a top priority in Brazil since 2003. As of that year, the SDE<sup>1</sup> started to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (such as dawn raids and leniency), and the CADE began imposing record fines on companies and executives found liable for cartel conduct. Also, the SDE significantly improved the interaction and cooperation with criminal prosecutors to strengthen anti-cartel enforcement in Brazil.

The strategy of focusing the available resources on cracking cartels has proven successful and there are an increasing number of investigations of anticompetitive practices, leniency applications and dawn raids. There are a growing number of applicants for the Leniency Program, including members to international cartels.<sup>2</sup> More than 10 leniency agreements were signed since 2003, and others are currently being negotiated. As a result, the number of search warrants served has significantly increased: from 2003 to 2006, 30 warrants were served and 2 people were detained without charges; and in 2007 and 2008, 177 warrants were served and 83 people were detained without charges. Ten executives were already sentenced to serve jail time (decisions under appeal) and there are currently more than 100 executives in Brazil facing criminal proceedings for their alleged participation in cartels.

Cartels, *as an administrative offence*, can be sanctioned with fines imposed on companies by the CADE that may range from 1 to 30 per cent of a company's pre-tax revenues in the year preceding the initiation of the proceedings. Individual managers responsible for unlawful corporate conduct may be fined an amount ranging from 10 to 50 per cent of the corporate fine. Other individuals, trade associations and other entities that do not engage in commercial activities may be fined from approximately R\$ 6 thousand to R\$ 6 million. Fines for repeated violations are doubled. Apart from fines, the Brazilian Competition Law provides for other sanctions as well, such as publication of the

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<sup>1</sup> The Competition law and policy in Brazil at the administrative level is governed primarily by Law No. 8,884, of 1994, as amended in 2000 and 2007 (the "Brazilian Competition Law"). The Brazilian antitrust system is composed of three agencies - namely, the Secretariat for Economic Monitoring of the Ministry of Finance ("SEAE"), the Secretariat of Economic Law of the Ministry of Justice ("SDE"), and the Administrative Council for Economic Defence ("CADE"). The SDE is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. The SEAE issues non-binding opinions in merger cases and it may also issue non-binding opinions related to anticompetitive practices. The CADE is the administrative tribunal, composed of seven Commissioners, which makes the final rulings in connection with both anticompetitive practices and merger review, after reviewing SDE's and SEAE's opinions.

<sup>2</sup> Up to date, in more than eight occasions where there is a leniency in place in other jurisdictions, the parties also presented themselves to the Brazilian authorities and offered to collaborate with the investigation in exchange for lenient treatment.



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decision in a major newspaper at the wrongdoer's expense; the prohibition of the wrongdoer from participating in public procurement procedures and obtaining funding from public banks for up to five years; and recommendation to the tax authorities not to allow the company involved in the wrongful conduct to pay taxes in instalments or obtain tax benefits.

In various occasions the CADE has shown its strong commitment to severely punish hard-core cartels. One great example was the crushed rock cartel case, where the tribunal fined the defendant companies in amounts ranging from 15 to 20 per cent of their 2001 pre-tax revenues. Other cartels were also sanctioned by the CADE such as the airlines cartel (2004), newspaper cartel (2005), pharmaceuticals cartel (2005), international vitamins cartel (2007), security services cartel (2007), and the sand extraction cartel case (2008).

Additionally, the Brazilian Cartel Settlement Program was introduced in 2007, by an amendment to the Brazilian Competition Law. The CADE is the antitrust agency with power to enter into settlements, and the SDE may issue a non-binding opinion directed to the CADE on whether to settle or not. In September 2007, the CADE issued Resolution No. 46/2007, establishing the negotiation rules. A number of settlements were already reached and others are being negotiated.

Apart from being an administrative infringement, *cartel is also a crime in Brazil*, punishable by a criminal fine or imprisonment from two to five years.<sup>3</sup> Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil. Since 2003, the SDE, as the chief investigative antitrust authority, is increasing cooperation with the Federal Police and Public Prosecutors to ensure that managers and directors of companies that do not come forward and take part in the Leniency Program face full criminal liability.

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<sup>3</sup> According to Brazil's Economic Crimes Law (Law No. 8,137/90), this penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant, or relates to a market essential to life or health.



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In order to achieve effective cooperation with the criminal prosecutors, a number of initiatives were taken:

***Getting public prosecutors interested and included in the enforcement process.*** SDE has convinced prosecutors of the importance of fighting cartels and that leniency is as valuable a tool for their prosecution efforts as it is for the administrative agencies. Prosecutors are viewed by SDE as partners in the leniency process and they are invited to sign the leniency letters. This is a way to help maximize benefits for potential applicants and ensure that administrative and criminal liability are addressed together. Also, in 2008, a Presidential Decree created a ‘*National Anti-Cartel Day*’ (October 8<sup>th</sup>) to raise public awareness that included an economic crimes workshop with prosecutors.

***Cultivating a relationship with public prosecutors.*** Each one of the 27 Brazilian States has a State Public Prosecutor’s Office. Early in its efforts to increase cooperation, SDE established a relationship with prosecutors in Sao Paulo and encouraged the creation of a special unit within the Sao Paulo State Prosecutor’s Office to investigate cartels and cooperate with the competition agencies in joint criminal and administrative investigations. The cooperation experience with São Paulo was used by SDE as a reference point to foster relationships with other prosecutors. Now, there are 27 state cooperation agreements.

***Using complementary expertise from different sources for a team effort in the fight against cartels.*** SDE’s interaction and cooperation with public prosecutors gives SDE the ability to tap into the different investigation tools and resources available through the police and prosecutors (for instance, the use of wiretaps). An extensive network of police and prosecutors more attuned to cartel conduct helps with cartel detection. In December 2007, the SDE and the Federal Police executed a cooperation agreement and an “*Intelligence Centre for Cartel Investigations*” was established to advance cooperative anti-cartel efforts.

***With time and consistent efforts, a partnership develops.*** Before the efforts to engage prosecutors, cartel investigations inevitably began with the agency’s administrative case. When SDE initiates an investigation of hard-core cartel conduct, they routinely ask prosecutors to start a parallel criminal investigation. Due to the recent outreach and education efforts, recently, prosecutors have begun to uncover their own leads and initiate cartel investigations themselves. Due to the existing



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relationships, the prosecutors have sought the competition agencies' assistance in such investigations.

*The results of competition agencies' efforts to build relationships with public prosecutors are based on significant time, effort and resources.* SDE has made anti-cartel enforcement its number one priority and views criminal prosecution of such conduct as critical to ensuring effective deterrence. To bolster enforcement, a real commitment was made to develop relationships with prosecutors founded on mutual respect and expertise sharing. Today, the benefits of this cooperative relationship are evident in the increased level of anti-cartel enforcement in Brazil.

More information on these and other initiatives can be found at SDE's website at (English section):  
<http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>



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*Only the text in Portuguese is authentic*

**AGREEMENT BETWEEN THE SECRETARIAT OF ECONOMIC  
LAW AND THE BRAZILIAN DEPARTMENT OF FEDERAL  
POLICE, REGARDING TECHNICAL AND OPERATIONAL  
COOPERATION IN THE ENFORCEMENT OF COMPETITION  
LAWS. Reference: Proceedings No. 08012.008900/2007-52**

The **SECRETARIAT OF ECONOMIC LAW (SDE)**, in this Agreement represented by its Secretary, Ms. Mariana Tavares de Araujo, who holds the ID nº 99.834 – SSP/DF and the CPF nº 005.584.367-06 and the **BRAZILIAN DEPARTMENT OF FEDERAL POLICE**, in this Agreement represented by its Director-General, Mr. Luiz Fernando Correça, who holds the ID nº 6010552716 – SSP/RS and the CPF nº 303.187.690-34, through mutual cooperation regime, under Law 8,666/93, celebrate this Agreement of Technical and Operational Cooperation, attending the following conditions:

**CONSIDERING** the SDE's authority regarding the enforcement of the Brazilian Competition Laws, as established in Law 8.884/94, Article 14, I and II;

**CONSIDERING** the SDE's authority in developing studies and researches which aim to guide the prevention of offences against the Competition Law, as established in Law 8,884/94, Article 14, I and II;

**CONSIDERING** Article 36 of the Law 8,884/94, which determines assistance and cooperation of federal authorities, agency directors and public companies, within their respective authorities, when requested by the SDE;

**CONSIDERING** the authority of the Brazilian Federal Police Department to, as established in the first paragraph of Article 144 of the Brazilian Federal Constitution and in the Law 10,446/02, investigate criminal offences with interstate or international effects which demand uniform repression, including cartels (Law 8,137/90, Article 4, I, a, II, III, VII); and

**CONSIDERING** the necessity of institutional cooperation between the Secretariat



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of Economic Law and the Department of Brazilian Federal Police regarding the enforcement of the Competition Law and the recognition of the importance of fighting anticompetitive conducts, including cartels.

**ARTICLE I - PURPOSE**

The purpose of this Agreement is to promote operational and technical cooperation between the SDE and the Brazilian Department of Federal Police and to establish mechanisms capable of ensuring effective and permanent communication between them, allowing the publicity of acts, the swift decision-making process related to common interests of the Parties, the development and improvement of techniques and procedures of investigation and, especially, the effective prevention and repression of offenses to the Competition Law.

**ARTICLE II – SHARING INFORMATION AND DOCUMENTS**

The Secretariat of Economic Law shall send to the Brazilian Department of Federal Police information and evidence collected through administrative proceedings and preliminary investigations initiated to investigate offenses, according to articles 20 and 21 of the Law 8.884/94.

**PARAGRAPH.** The Brazilian Department of the Federal Police shall send to the Secretariat of Economic Law information and evidence collected through police investigation, if related to the anticompetitive conducts mentioned in Articles 20 and 21 of Law 8,884/94.

**ARTICLE III – CONFIDENTIALITY**

Documents and information shall be treated as confidential whenever requested by the Secretariat of Economic Law or the Brazilian Department of Federal Police. The confidentiality analysis shall be done according to the respective laws and other applicable rules and regulations.

**FIRST PARAGRAPH**

Whenever the Parties diverge concerning the rules applied for the confidential treatment of documents and information, the criteria indicated by the Party which originated the document or information shall be applied.

**SECOND PARAGRAPH**

The authority conducting the investigation shall be responsible for determining



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the confidential treatment of information and documents of the case.

**ARTICLE IV – COOPERATION ACTIVITIES**

**FIRST PARAGRAPH** – The Secretariat of Economic Law, amongst other attributions, whenever requested, shall provide technical and operational assistance on the organization and planning of diligences and dawn-raids, as well as shall issue technical reports on documents and information available in the case, regarding the structure and other aspects of the market involved.

**SECOND PARAGRAPH** – The Brazilian Department of Federal Police, amongst other attributions, whenever requested, shall provide technical and operational assistance on organizing, planning and conducting diligences, dawn-raids and expert examinations.

**THIRD PARAGRAPH** – Both Parties may request the participation of agents from each other when conducting testimonies and hearings of witnesses and informants.

**FOURTH PARAGRAPH** –Whenever requested by any of the Parties, task forces may be created to work on an investigation of an anticompetitive conduct.

**FIFTH PARAGRAPH** – The Federal and/or State Public Prosecutors Office may be invited to participate on the abovementioned task force.

**SIXTH PARAGRAPH** – With the aim of developing and promoting best practices with regard to the prevention and repression anticompetitive conducts, the Parties agree to immediately begin cooperation for the exchange of technical and operational information in relation to antitrust, investigation techniques and intelligence.

**ARTICLE V – WORKING GROUP**

It is hereby created the Working Group responsible for (i) coordinating the exchange of information, documents and expertise between the Parties and (ii) setting up a Cartel Investigation Center which shall use the synergies of the work done regarding anticompetitive conducts established in Law 8,884/94 and 8,137/90.

**FIRST PARAGRAPH** – In order to fulfil its aims, the Working Group may create task forces; organize seminars, courses and exchange programs, arrange technical and operational support for dawn raids.



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**SECOND PARAGRAPH** – The Working Group shall be composed by four agents, two from the Secretariat of Economic Law and two from the Brazilian Department of Federal Police.

**THIRD PARAGRAPH** – Among the four agents abovementioned, there shall be one central agent of the Secretariat of Economic Law and one central agent of the Brazilian Department of Federal Police and they shall be responsible for sending and receiving requests related to the present agreement.

**FOURTH PARAGRAPH** – The agents of the Working Group shall be nominated by the Secretary of Economic Law and the Director of the Brazilian Department of Federal Police within thirty days of the publication of the present agreement through a joint Ordinance.

**FIFTH PARAGRAPH** – The decisions of the Working Group shall be submitted to the Secretary of Economic Law and the Director of the Brazilian Department of Federal Police which shall issue a final decision through a joint Ordinance.

**SIXTH PARAGRAPH** – The Working Group shall have access to electronic equipment acquired by the Secretariat of Economic Law and the Brazilian Department of Federal Police in order to investigate the anticompetitive conducts listed on articles 20 and 21 of Law 8884/94.

**SEVENTH PARAGRAPH** – The electronic equipment acquired by the Secretariat of Economic Law may be used by the Brazilian Department of Federal Police on other investigations as long those related to the anticompetitive conducts listed on articles 20 and 21 of Law 8884/94 are treated as a priority.

**ARTICLE VI – PUBLICATION**

The Secretariat of Economic Law shall make public a summary of this agreement through the Official Gazette within five days of its signature.

**ARTICLE VII – ENTRY INTO FORCE**

The present agreement shall enter into force on the date of its signature and shall remain in force for one year, being its extension possible through mutual understanding between the Parties.



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**ARTICLE VIII – TERMINATION**

The agreement may be terminated at any time by the Parties in case of non-compliance of any of the agreed provisions, of a new Law or of any other facts that makes compliance not possible, through written notification with prior notice of thirty days.

**ARTICLE IX – FINAL PROVISIONS**

Whenever the application of this agreement is unclear the Parties shall agree in writing on the outcome. The venue chosen by both Parties is the Federal Court of Brasília, Distrito Federal.

Brasília, 26<sup>th</sup> December 2007

Signatures

Witnesses

